

Vermont Agency of Transportation Buy America Guidance

Rev March 2, 2016



Purpose:

The intention of this guide is to aid staff with understanding the Federal Highway Administration (FHWA) Buy America (BA) policy, changes that have occurred to the policy, recognizing how Buy America affects VTrans and VTrans Contracts, and identifying which Contract Pay Items and Materials are subject to Buy America. This guide will also cover the history of FHWA's BA policy, the responsibilities of VTrans and Contractors in relation to BA, and how BA is managed in SiteManager. The information provided herein was collected by the SiteManager Materials Maintenance Team. This guide is intended for use by Resident Engineers, Office Engineers, Construction Inspectors, Contractors, and the Materials Acceptance Unit, as well as anyone else involved with VTrans Construction Contracts and materials acceptance.

Brief History of Buy America:

The 1933 Buy American Act (separate from Buy America) was a government-enacted response to the Great Depression in effort to support the American industry and its workers by requiring that all products used on federally-funded projects be American-sourced, regardless of material. This Act covered only those products directly purchased with Federal funds. In 1978, Congress included a Buy America provision in the Surface Transportation Assistance Act (STAA). This provision extended the reach of the Buy American Act to any materials purchased with Federal funds, including state and local authority purchases reimbursed with Federal monies. In 1982 (later clarified in 1983), the Buy America provision was modified to include only certain products (steel, cement, or manufactured products) and to require that those materials must only be produced in the United States of America (USA). Raw steel materials are not required to be of USA origin. A modification made in 1991 by the Intermodal Surface Transportation Act (ISTEA) included products made of iron. FHWA's Buy America policy uses the 1982 (1983 clarification) as the basis.

All steel and iron products used on federally aided projects must meet the requirements given in [23 CFR 635.410](#). Please note in the absence of a waiver 23 CFR 635.410(b)(4) allows for the *minimal use of foreign steel and iron materials, if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater*. Application of the minimal use provision will need appropriate documentation of the value of steel or iron product used.

It is important to note that the "2012 FHWA Memorandum", which outlined a 90% interpretation of the Buy America provision, was vacated by the United States District Court on December 22, 2015 and so does not apply.

As Buy America continues to evolve, the VAOT will continue to inform affected personnel.

Importance of Buy America:

Any VAOT Contract that is federally funded is subject to Buy America. FHWA is not obligated to reimburse State purchases of steel or iron products if those products are not BA compliant, therefore leaving the State of Vermont monetarily accountable for those materials.

VTrans Buy America Responsibility:

VTrans shares responsibility for ensuring that products covered by FHWA's BA policy are BA compliant. One way VTrans enforces the BA requirements is through certifications. The Certification Section is responsible for ensuring that certifications for BA materials contain a Buy America Clause stating that all manufacturing processes have occurred in the United States. These certifications must also contain documentation sufficient enough to identify a chain of custody of the material. The requirements for certifications that must comply with Buy America are stated in Subsection 700.02 MATERIALS CERTIFICATIONS. in the *VTrans Standard Specifications for Construction* as follows:

“For steel and iron materials, the following requirements shall apply:

- (1) To comply with Buy America provisions, a manufacturer must certify that all manufacturing processes have occurred in the United States.
- (2) To identify a chain of custody documentation trail that the product meets the Buy America provisions, each supplier or fabricator involved in the manufacturing processes of a product will be required to include in its certification a statement that each process performed by them which alters the physical form or shape or changes its chemical composition was entirely performed in the United States.”

In addition to the certifications processed by the Certification Unit, field staff of VTrans also assumes responsibility for verifying that all BA materials to be installed are BA compliant. This includes reviewing the certification to ensure that the material described within the certification documentation correlates to the material received on-site. All Buy America products should be properly certified before installation and before payment.

Contractor Buy America Responsibility:

Contractors involved in VTrans Contracts also assume responsibility with respect to Buy America. They must provide the State with Buy America compliant materials accepted where noted below:

107.22 BUY AMERICA PROVISIONS.

- (a) General. All steel products permanently incorporated into Federal-Aid projects shall be products that have been entirely manufactured within the United States. All manufacturing processes of the steel or iron material in a product (i.e., smelting and any subsequent process which alters the steel material's physical form or shape or changes its chemical composition) must occur within the United States to be considered of domestic origin. This includes processes such as rolling, extending, machining, bending, grinding, and drilling.
- (b) Use of Foreign Materials. This requirement does not prevent a minimal use of foreign materials, provided the cost of foreign materials used does not exceed 0.1 percent of the total Contract price or \$2,500, whichever is greater. The cost of foreign steel or iron is defined as its value delivered to the project. The Contractor shall notify the Engineer if it intends to use any foreign materials on the project.

- (c) Coatings on Steel/Iron. In accordance with 23 CFR 635.410, iron has been added to the materials now subject to the Buy America requirements, and the action of applying a coating to a covered material (i.e., steel and iron) is now deemed a manufacturing process subject to Buy America. Coating includes epoxy coating, galvanizing, painting, and any other coating that protects or enhances the value of a material subject to requirements of Buy America. Buy America requirements of 23 CFR 635.410 are applicable to all Federal-Aid highway construction projects (NHS and non-NHS).”
- (d) Waiver is provided. When a Buy America waiver is given it should be done before the project is advertised for construction. The waiver will be included in the specifications

SiteManager Management of Buy America:

Beginning with the 2016 Construction Season SiteManager will be set up to withhold payment for only those Pay Items with materials that are subject to Buy America.

The payment indicators in SiteManager are set up as a hierarchy: Pay Item, Material, and Requirement; in that order.

At the Pay Item level in SiteManager all Pay Items, with at least one material subject to Buy America, will have the master Material Discrepancy Indicator set to “yes”. The Material Discrepancy Indicator alerts SiteManager to withhold payment until all of the Pay Item’s materials sampling and testing requirements have been fulfilled.

However, Buy America only applies to the certification of steel or iron materials and some Pay Items have more than one material, with some materials being subject to Buy America and others not; we address this at the Material level in SiteManager.

At the Material level in SiteManager we set the Conversion Factor to “1” to alert SiteManager to withhold payment until the specific material’s certification requirement has been fulfilled.

Materials with a “1” for a Conversion Factor will need to have their certification requirement satisfied before payment will be released. A “0” Conversion Factor will allow payment to be released without that material requirement being met.

The set up information provided above is ONLY for Buy America Pay Items. On a Sampling Checklist you may see non-Buy America pay item materials with a Conversion Factor of “1”; if so this is NOT an indication that the requirement is tied to payment.

Only unsatisfied Buy America pay item material certification requirements will withhold payment.

This in no way releases Agency staff or their Contractors from ensuring all required Sampling & Testing requirements are met per the Standard Specifications for Construction, the Materials Sampling Manual, Contract documents and all other regulatory documentation.